Supreme Court, U.S.
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(1)

SUPREME COURT OF THE UNITED STATES

NO.

GLORIA B. MARTELLO
Plaintiff

VS.

TOWN OF FERRIDAY, OWEN & WHITE, INC.
And US FILTER WASTEWATER GROUP, INC.
Defendants

Petition for Writ of Certiorari to the Court of Appeals of Louisiana, Third District

---

A CIVIL ACTION

APPLICATION OF THE TOWN OF FERRIDAY FOR A WRIT OF CERTIORARI OR REVIEW

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40 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Trial Court, Court of Appeal and Louisiana Supreme Court err when they failed to grant writ applicant's Exceptions of No Right and No Cause of Action based on Discretionary Act Immunity, before certifying the class action?

2. Is writ applicant, the **Town of Ferriday,** immune from liability for its performance of a discretionary function, namely operating a water treatment plant for its town residents?

3. Is the analysis required of District Courts into the predominance and superiority requirements of **Article 591(B)(3) of the Louisiana Code of Civil Procedure** sufficiently made without considering whether the class action effectuates substantive law, judicial economy, and individual fairness?

4. Does the Substantive Law of Louisiana allow for the recovery of emotional damages for aggravation, annoyance, and inconvenience, experienced by a class of Town residents, students, and employees who had to boil drinking water during a four month Boil Notice, but who have sustained no physical injury or illness?

5. Does a District Court properly exercise its discretion, within the framework of **Article 591**, in certifying a class of persons whose only damages are emotional, unaccompanied by physical injury, without conducting a rigorous inquiry into every aspect of the case, including the substantive elements of each asserted cause of action and each affirmative defense applicable to the claims?

6. Do the common issues of defendants' alleged fault predominate over the individual issues when the

substantive elements of the claims of the vast majority of the class members, involving inconvenience and annoyance without physical injury, can only be determined by an examination of the special circumstances surrounding each claim?

7. Do the common issues of defendants' alleged fault predominate when the causes of action assert legal theories that raise individual issues of fraud, standing, reliance, knowledge and prescription?

RULE 29(6) CORPORATE DISCLOSURE STATEMENT

Defendant and writ applicant, the Town of Ferriday, is a political subdivision located in Concordia Parish, Louisiana.

Plaintiff, Gloria Martello is a natural person residing in Ferriday, Concordia Parish, Louisiana, and is the sole proprietor of Brocato's Restaurant located in Ferriday, Louisiana. Mrs. Martello is represented by Ms. Linda Harang, Ms. Julie Jacobs, and Mr. Steven Murray of the Murray Law Firm in New Orleans, and Mr. Charles Norris of Vidalia, Louisiana.

Co-Defendants, Owen & White Engineers, Inc., Mr. Eugene Owen, Mr. Roy Waggenspack, and Mr. Peter Randy Hollis, individually, are principals of an engineering firm located in Baton Rouge, East Baton Rouge Parish, Louisiana. Owen & White Engineers are represented by Mr. Stephen Wilson, Mr. John Wolff and Mrs. Nancy Gilbert of the Keogh, Cox & Wilson Law Firm in Baton Rouge, Louisiana.

Co-Defendant, US Filter Wastewater Group is the successor corporation of Neptune Microfloc Corporation, which sold a pre-packaged water plant to the Town of Ferriday on the recommendation of the Owen & White Engineers. US Filter Wastewater Group was recently purchased by Vivendi, a Corporation believed to be chartered under the laws of France. US Filter Wastewater Group is represented by Mr. Robert Kerrigan, Mr. Victor Franckiewicz, and Mr. Joseph McReynolds of the Deutsch, Kerrigan & Stiles Law Firm, of New Orleans, Louisiana.

APPENDIX/CITATIONS OF OPINIONS BY LOWER COURTS

Appendix A	Judgment of the District Court, signed July 25, 2001, Civil Action: 36,358-A, 7th Judicial District Court, Concordia Parish, Louisiana.
Appendix B	Written Reasons of the District Court, signed July 25, 2001, Civil Action: 36,358-A, 7th Judicial District Court, Concordia Parish, Lousiana.
Appendix C	Decision of the Third Circuit Court of Appeal on original Application dated March 6, 2002 ***Martello v. City of Ferriday, 01-1240 (La. App. 3 Cir. 3/6/02) 2002 WL 356167***
Appendix D	Decision of the Third Circuit Court of Appeal upon the Town's Application for Rehearing dated May 1, 2002, Docket No. 01 01240-CA.
Appendix E	Writ Application denial by Louisiana Supreme Court on Class Certification and Discretionary Act Immunity issues dated June 7, 2002, No. 2002-C-1514.

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STATEMENT OF JURISDICTION

United States Supreme Court Rule 10 provides that jurisdiction is proper in this case because a state court of last resort has decided an important issue which conflicts with this Court's earlier rulings concerning the doctrine of Discretionary Act Immunity in ***Bogan v. Scott-Harris***.[1] This Honorable Court also has jurisdiction over this case because the Louisiana Supreme Court's denial of a writ of certiorari implicitly refused to consider this Court's decision upholding Discretionary Act Immunity for alleged negligent acts committed by the employees of a governmental entity (the Federal Aviation Administration) in ***United States v. Varig Airlines***.[2]

The Louisiana Supreme Court has allowed class certification in this case where the named plaintiff, proposed class representatives, and potential class members would only recover damages based on nuisance, aggravation, and annoyance, without providing supporting documentation of any other damages, contrary to Louisiana substantive law. This Honorable Court has recently reversed the grant of class certification in ***Amchem Products v. Windsor*** and ***Ortiz v. Fibreboard Corporation***, when plaintiffs failed to prove that the requirements of **Federal Rule of Civil Procedure, Article 23(b)(1)(B)** "limited fund" certification had been met.[3] While this case was certified under Louisiana procedural law, the 1997 amendments to the **Louisiana Code of Civil Procedure** articles concerning class certification are virtually identical to **Federal Rules of Civil Procedure, Article 23**. In cases decided before the 1997 Amendments, Louisiana Courts have repeatedly directed lower Courts to look to **Rule 23** and its interpretative jurisprudence for guidance, particularly concerning the predominance and superiority analysis now made statutory,

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[1] ***Bogan v. Scott-Harris, 118 S.Ct. 966, 523 U.S. 44 (1998)***

[2] ***United States v. Varig Airlines, 467 U.S. 797 (1984)***

[3] ***Amchem Products v. Windsor, 521 U.S. 591, 117 S.Ct.2231, 138 L.Ed.2d 689 (1997); Ortiz v. Fibreboard Corporation, 119 S.Ct. 2295, 527 U.S. 815, 144 L.Ed.2d 715 (1999).***

before exercising their discretion to certify a class.[4]

This writ application is for review of a District Court Judgment, affirmed by the Louisiana Third Circuit Court of Appeal, and subsequent denial of the Town's writ application by the Louisiana Supreme Court, which certifies a potential class of 4,000 persons who allegedly seek to recover emotional damages, unaccompanied by any physical injury or illness, from three separate defendants under different factual and legal theories of recovery, some of which are novel, untested and subject to prescription.[5] The certification of the class in this case represents an expansion into a whole new area of "mass tort" litigation, involving purely emotional damages unaccompanied by any physical injury.

The danger of opportunistic and manufactured claims is even more pronounced in cases like the one at bar, involving claims for pure emotional injury, without medical treatment, and in any other case in which large groups of people, who have sustained no physical injury, but may have witnessed an event, such as a neighborhood fire or a plant explosion miles away, file class actions for emotional distress, anxiety, aggravation, or inconvenience. As a procedural device, the class action is not supposed to give substance to claims that have none, or apply to claims involving issues of causation and injury-in-fact that can only be resolved on an individual basis. If the policy limiting causes of action for purely emotional damages is to discourage the litigation of spurious claims, then that policy is not advanced by the certification of a class of persons on the basis of a Petition filed by one or two disgruntled persons purporting to assert emotional damages for the group. The dangers of magnified claims, skewed

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[4] ***State ex rel. Guste vs. General Motors Corp.*, 370 So.2d 477 (La. 1978)(on rehearing); *Williams v. State*, 350 So.2d 131 (La. 1977); *Stevens vs. Board of Trustees*, 309 So.2d 144 (La. 1975); *Ford v. Murphy Oil, U.S.A., Inc.*, 96-2913 (La. 9/9/97), 703 So.2d 542; *Banks v. New York Life Insurance Co.*, 98-0551 (La. 7/2/99), 737 So.2d 1275.**

[5] Two of the five purported class representatives also seek recovery of losses to their businesses and damages to personal water filtration devices used in their businesses.

trial outcomes, and unfair settlement for fear of "all-or-nothing" verdicts militate against certification.

Additionally, a policy consideration of Discretionary Act Immunity for similarly situated towns must be seriously considered by this Honorable Court, since the Louisiana Supreme Court, the Louisiana Third Circuit Court of Appeal, and the Trial Court gave no consideration to this doctrine and its application to class certification.

The Town of Ferriday asks that this Application be granted, and for full briefing and argument, to determine whether the Town is entitled to Discretionary Act Immunity, and whether a class should be certified consisting of persons claiming emotional damages without any physical injury.

RELEVANT STATUTORY PROVISIONS

La. R.S. 9:2798.1 states:

> Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy making or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

Louisiana Code of Civil Procedure, Article 591 provides as follows:

> A. One or more members of a class may sue or be sued as representative parties on behalf of all, only if:
>
> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) There are questions of law or fact common to the class.
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class.
>
> (4) The representative parties will fairly and adequately protect the interests of the class.

(5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.

B. An action may be maintained as a class action only if all of the prerequisites of Paragraph A of this Article are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of:

(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to these findings include:

(a) The interest of the members of the class in individually controlling the prosecution or defense of separate actions;

(b) The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) The desirability or undesirability of concentrating the litigation in the particular forum;

(d) The difficulties likely to be encountered in the management of a class action;

(e) The practical ability of individual class members to pursue their claims without class certification;

(f) The extent to which the relief plausibly demanded on behalf of or against the class, including the vindication of such public policies or legal rights as may be implicated, justifies the costs and burdens of class litigation; or

(4) The parties to a settlement request certification under Subparagraph B(3) for purposes of settlement, even though the requirements of Subparagraph B(3) might not otherwise be met.

C. Certification shall not be for the purpose of adjudicating claims or defenses dependent for their resolution on proof individual to a member of the class. However, following certification, the court shall retain jurisdiction over claims or defenses dependent for their resolution on proof individual to a member of the class.

STATEMENT OF THE CASE

1) Allegations of the Lone Plaintiff

This case involves a lawsuit filed in October of 1999, by Gloria B. Martello, the owner of Brocato's Restaurant in Ferriday, Louisiana, against the Town of Ferriday, Owen & White Engineering, and later US Filter Wastewater Group. Her original Petition asserted four separate causes of action, including strict

liability, breach of contract, negligence and redhibition, predicated on the engineering firms' alleged fault in designing, maintaining and operating the Town's new water plant, and the Town's alleged negligent operation of that same plant. The claim against US Filter Wastewater Group, the successor corporation of Neptune Microfloc, was predicated on the improper design, and alleged negligently conducted pilot plant water content study performed in 1983, which indicated that the Adsorption Clarifier System in the Neptune Plant was capable of removing Manganese from Marengo Bend, the source of the Town's water. The plant came online in late 1988, and the first Manganese problems surfaced in April of 1989.

Mrs. Martello seeks recovery of damages for alleged "severe mental and emotional distress", fear of disease, inconvenience, annoyance and discomfort, along with unspecified business and property losses sustained. Mrs. Martello also sought damages for the three day disruption of water service caused by the shut down of the plant and an issuance of a boil water notice by the State Department of Health and Hospitals in August, 1999. The Boil Notice was lifted in December, 1999. Mrs. Martello's Petition also sought class certification under the **Louisiana Code of Civil Procedure, Article 591**. Mrs. Martello alleged twenty-four separately numbered allegations of common issues of law and fact, all pertaining to the defendants' alleged legal liability. The Petition also advanced the right to pursue remedies under two contracts between the Town and Owen and White under the Louisiana Civil Law *stipulation pour autrui* (third party beneficiary) doctrine.

Prior to its filing of an Answer, the Town of Ferriday asserted an Exception of No Right of Action, which was orally amended by agreement of all counsel at the class certification hearing to an Exception of No Cause of Action. The Town also filed a Dilatory Exception of Vagueness which was never waived or set for hearing by the Trial Court.

(2) The Certification Hearing

Mrs. Martello sought to have the class certified under **Louisiana Code of Civil Procedure, Article 591(B)(1)(b)**, known

as the "limited fund" class certification theory. In March, 2001, approximately six days before the Certification Hearing, Martello attempted to amend her Petition a third time to include Shelby Guidry, Mildred McKinney, Christine Murray Roberts, and Tommie Massey as additional petitioners,[6] but Leave to Amend was not granted before the Certification Hearing.

In depositions taken prior to the amendment as part of the pre-certification discovery, McKinney, Roberts, and Massey testified that by joining suit they were not seeking compensation for themselves and wanted only clean water from the plant.[7] The depositions of these class members were proffered at the class certification. Mrs. Roberts testified in deposition:

> Well, I have to admit I never thought that we were gonna get any money out of this. I just wanted to prove a point that we really need to do something about the water....I do like Ferriday. I know people that live there, and I just, you know, wanted to stand up and at least tell what I had to go through in hopes that it would help to get things changed for the better.

Mrs. Roberts moved with her family to Natchez, Mississippi in late August, 1999, a few days after the Boil Order was instituted. Mrs. Roberts' testimony at Trial was representative of the late- added putative class representatives toward personal

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[6]Neither the Third Supplemental and Amending Petition nor Order granting leave to file it appear in the record. Petitioners attempted to file the Petition about six days prior to the certification hearing, when all defendants objected. Petitioners withdrew the Amending Petition, and the Hearing to allow the Amending Petition was set for August 15, 2001, but was continued by plaintiffs without date. As of this date a hearing requesting leave of court to file a superceding and amending petition was heard on August 20, 2002, and the Trial Court took this Motion under advisement.

[7]The pre-class certification depositions appear in the record as a proffer.

compensation as follows:

> Q. And isn't it fair to say that you never thought that you'd get any money out of this, you just wanted to prove a point that they, the City, really needed to do something about the water?
>
> A. Yes, I did say that.

Massey does not live in Ferriday, but is an Administrator of a Nursing Home in Ferriday and owned by a company in Atlanta, Georgia. Massey testified in deposition that he was seeking reimbursement of losses sustained only by his corporate employer.[8] The nursing home corporation, however, is not a party to this action.

At the certification Hearing conducted April 30 through May 4, 2001, McKinney, Roberts, and Massey all changed their testimony and claimed that they were seeking personal compensation for their individual stress, aggravation, and inconvenience suffered during the time the Boil Water Notice was in effect.

Guidry and Martello, neither of whom used the Town's water at their home for drinking or cooking, are the only claimants seeking to recover business losses and property damage for themselves.[9] Guidry's claim is for lost laundry business during the shutdown and for expenses and reimbursement of the price of a filter system she had installed in her laundraumat in 1996, three years before the boil advisory, to filter out Manganese. Mrs. Guidry stated that her water filter system was constantly having to

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[8]"I don't have anything other than expenses." US Filter Proffer #3, p. 6.

[9]Martello moved back to Ferriday in 1986, but used only bottled water for personal consumption. Guidry does not use the Town's water in her home, since she does not live in the Town of Ferriday, but only uses the Town's water at her laundromat located within the city limits.

be cleaned and "regenerated" during and after the Boil Water Notice.

None of the petitioners claimed or proved that they suffered any physical injuries or illnesses from consuming or bathing in the water, and no evidence was submitted at the certification hearing that any purported class member had sustained any physical injury or illness as a result of the Boil Notice. None of the class representatives testified that they feared illness or disease, or sought medical or psychological counseling. All but Massey testified that they intended to pursue this action even if it were not certified as a class.

Other witnesses called by the plaintiff established that the Town of Ferriday hired Owen and White Engineers in 1978 to undertake improvements and extensions of their municipal water system and to investigate the possibility of using an additional or alternative water source. The existing plant drew ground water from the Mississippi River alluvial sands, but was in poor condition. Owen & White investigated a number of alternative water sources, but eventually settled on Marengo Bend known at the time to contain high levels of iron and Manganese as a surface water source. A pipeline system was erected to connect the plant to the water intake structure on Marengo Bend. Owen & White recommended that a design for the intake structure that was conscious of certain hyper-inflated construction costs which were prevalent between 1982 and 1984. The Town of Ferriday also had lost revenue sharing in the first part of the 1980's, so an adsorption clarifier system was utilized rather than the existing settling pond and/or tube settling technology, which was more expensive at the time. This savings was approximately $170,000.00 in construction costs, and Owen & White recommended a pilot plant water study, which was conducted on or about May 20, 1983, at the intake structure. Owen & White then determined that the Neptune Plant was suitable for the job and recommended that the Town buy the Plant at the lower cost. The Plant was built and ultimately commenced operation in December 1988.

In Spring of 1989, complaints began surfacing about the staining of laundry in Ferriday, which Owen & White determined to be caused by high levels of Manganese in the water. These high levels of Manganese typically occurred when the water levels were

lower during the dryer summer months, and recurred periodically every year until the Summer of 1999.

The presence of Manganese is a secondary water concern to the Louisiana Department of Health and Hospitals, and does not pose a threat of bodily injury to anyone consuming that water. Manganese does have something of an odor and reacts adversely with laundry bleach, which discolors and stains clothes.

In 1989, Owen & White recommended several solutions, including a floating intake structure which was never approved by either the Town or the U.S. Army Corp of Engineers. Owen & White did design and install a culvert system which forced water to be drawn through the valve from a higher level where the levels of Manganese in the water were lower.

The Town's financial problems continued to affect the operation of the plant, and ultimately a $1.1 million dollar grant was obtained from the U.S. Department of Agriculture to either install a floating intake structure, or a detention and oxidation tank. To date, neither alternative has been implemented.

In August, 1999, during an inspection of the Town's Plant, Michael Cazes of the Louisiana Department of Health and Hospital, Office of Public Health, found rising turbidity levels (particulate matter in the water) in excess of Federal and State levels. Mr. Cazes suspended the inspection to give the Town time to correct the problem, and when it couldn't, he issued a Boil Water Advisory. The Advisory was a request that the Town notify all water customers to boil their water before drinking or cooking with it, and when Mr. Caze later learned that a local school had not received notice, a Boil Water Notice was issued on August 24, 1999. Mr. Caze testified that the State's issuance of the Boil Notice did not mean that the Town's water was not drinkable, only that the Town's water quality (clarity) was questionable.

At that same time, the Plant shut down due to the accumulation of sludge in the Cleanwater Holding Tank. The sludge clogged up the clean water filter and drained the tank of needed fresh water to backwash and clean the filter. The sludge was removed in three days, and the turbidity levels were brought under control within a few days after the holding tank had been cleaned and water service restored. Ninety-eight percent (98%) of the water samples tested in October, and all of the samples tested

in November were within the State and Federal guidelines.

The State Department of Health and Hospitals did not lift the Boil Notice until December-1999, after the Town made repairs to the Plant. The Plant has been producing quality water ever since, and free water was made available by the Town of Ferriday to all its water customers and residents at schools and businesses during the period of the Boil Notice.

(3) The Judgment

After the Class Certification Hearing was held, the Trial Court issued a Judgment, along with Written Reasons for that Judgment on July 25, 2001. ***(App. "A")*** The Trial Court's Reasons for Judgment were a verbatim copy of the Proposed Findings of Fact and Conclusions of Law submitted by plaintiff's attorneys. ***(App. "B")*** Abandoning the theory of the Limited Fund under **Louisiana Code of Civil Procedure, Article 591(B)(1)(b),** originally pled by the plaintiff, the Court concluded that the plaintiffs had satisfied all of the statutory requirements of **Louisiana Code of Civil Procedure, Article 591(A)(1)-(4)** concerning numerosity, commonality, typicality, and adequacy of representation. Also, the Court held that the common issues of law and fact predominated over individual issues, and that a class action was superior to all other available methods of adjudication required under **Article 591(B)(3).** The Trial Court had previously excluded defendant's expert on class certification, who was prepared to testify that common issues of law and fact did **not** predominate over individual issues, and that one consolidated lawsuit was superior to the class certification. This exclusion was solely based on the plaintiff's attorneys' representation that they were proceeding under the Limited Fund Theory of **Louisiana Code of Civil Procedure, Article 591(B)(1)(b).**

The Trial Court specifically acknowledged in Written Reasons that not one of the purported class members suffered any physical injury, illness, or disease. The Trial Court incorrectly concluded that the common issues of liability and fault predominated because the "claims for damages differ only by degree or amount, but they are all of the same common types and categories, predominantly being claims of inconvenience,

annoyance, and discomfort; mental and emotional distress and stress; non-reimbursed personal expenses; and also non-reimbursed business expenses." The Trial Court further concluded that the class action was a superior device, without giving any consideration to alternative procedures such as joinder or consolidation, because of the Court's presumed authority to order separate Jury Trials of liability issues without the party's consent, as would otherwise be required under **Louisiana Code of Civil Procedure, Articles 1562 and 1736**. The District Court failed to note that the statutory authority for ordering separate Jury Trials under **Article 593.1** had been repealed in 1997. The District Court adopted the following class definition:

> All persons, businesses, or entities who belong to at least one of the following five groups, and who, as a direct result of receiving the water from the Town...Water Plant between August 20, 1999 and December 22, 1999, have at least one of the following claims: Mental and emotional distress; non-reimbursed personal expenses; non-reimbursed business expenses; loss of personal income; loss of business income, annoyance, discomfort, and inconvenience; personal injury including fear of contraction of disease or illness; or property damage.
>
> 1) Residents [who received water at their residence from the Town];
>
> 2) Owners and/or operators of businesses [that receive their water at their business];
>
> 3) Lessors [that receive their water at their lease property];
>
> 4) Employees of business [that receive their water at their place of employment]; and
>
> 5) School students and patients in healthcare facilities [who receive their water at school or the facility].

(4) Post Certification Amendments to the Petition and Recusal

On July 27, 2001, after the entry of the Certification Judgment, Mrs. Martello moved for Leave to file a Superseding and Consolidated Amended Petition listing Roberts, McKinney, Massey, and Guidry as petitioners, and adding fifteen additional itemized allegations of common issues of law and fact. The Order for Leave to file this Amendment has not yet been signed.

The Consolidating Amended Petition adds new claims of fraud against three additional defendants, Eugene Owen, Roy Waggenspack, and Peter Hollis, all employees of Owen & White Engineers. Plaintiffs alleged that they were unaware of the alleged fraudulent conduct of Owen & White and the newly added defendants until the individual defendants' depositions were taken in July, 2000, as part of the pre-class certification discovery.[10] They alleged that this newly discovered fraud was a "cause-in-fact of the damages the petitioners and class members have suffered and continue to suffer" in the case.

Less than two weeks after signing the plaintiffs' verbatim Reasons for Judgment, on August 6, 2001, Judge Kathy Johnson, who presided over the certification hearing and issued the certification Judgment, and Judge Leo Boothe, the other sitting Judge in the 7th JDC, both recused themselves from the case on their own Motion. The Louisiana Supreme Court subsequently appointed Judge Charles R. Brackin to preside over the case. All defendants filed Suspensive Appeals challenging the certification of the suit as a class action, and the Louisiana Third Circuit Court of Appeal affirmed the Judgment, citing the manifest error standard

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[10]The Certification Hearing was conducted ten (10) months after these depositions were taken. Certainly additional issues of fraud would not be common, and whether the named plaintiffs or class representatives would have any action for fraud is yet another issue.

of review but undertaking no analysis of the appropriateness of the class action in effectuating substantive law or of the individual proof necessary for each claimant to establish a claim. ***(App. "C")*** The Town of Ferriday applied for a Rehearing, on the basis that the Third Circuit stated that there was never an Exception of No Cause and/or No Right of Action placed before it for decision. The Request for Rehearing was denied on May 1, 2002. ***(App. "D")*** Application for Supervisory Writs was made to the Louisiana Supreme Court by all defendants, and that Court denied writs on June 7, 2002. ***(App. "E")***

SUMMARY OF ARGUMENT

The Town of Ferriday's providing water to citizens is clearly a discretionary function, and actions taken by Town employees to provide such water should be protected from liability by Discretionary Act Immunity. This Court has held that, although impossible to define with precision every contour of the discretionary function exception, the nature of the conduct and the goal of preventing judicial "second guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of a tort action, should be protected with immunity.[11] This Court recently held that individual legislators are individually immune from liability for their legislative acts.[12] Clearly, the Town of Ferriday should be dismissed from this class action suit because the actions taken by their employees in providing water to their citizens are rooted in social, economic and political policy, protected by Discretionary Act Immunity.

This case is not appropriate for class certification under the 1997 amendments to **Louisiana Code of Civil Procedure, Article 591**, which make it nearly identical to **Federal Rule of Civil Procedure, Article 23**. The large number of purportedly aggrieved class members consists of persons whose only alleged injuries are emotional damages associated with inconvenience and annoyance,

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[11] ***United States v. Varig Airlines, 467 U.S. 797 (1984).***

[12] ***Bogan v. Scott-Harris, 118 S.Ct. 966, 523 U.S. 44 (1998).***

unaccompanied by any physical injury or illness whatsoever. Under Louisiana Law, compensable damages for emotional distress, unaccompanied by physical injury or illness, is necessarily dependant upon **individual proof** surrounding the circumstances and severity of the alleged distress. As a matter of substantive policy and law, to guarantee that the claim is not spurious, there must be proof of an especial likelihood of genuine and serious mental distress that can only be determined on an individual basis. Such individual claims are not maintainable as a class action in light of the prohibition in **Article 591(C)** that "Certification should not be for the purpose of adjudicating claims or defenses dependant for their resolution upon proof individual to a member of the class."

The evidence submitted at the certification hearing failed to establish that common issues of fact and law predominate over the issues affecting individual members or that the class action was superior to other methods of adjudicating the controversy, particularly Louisiana's Procedure for Joinder and Consolidation. The evidence did not establish a sufficient number of truly aggrieved persons that would make joinder or consolidation impracticable, or that the compensable claims asserted by the five putative class members were typical of other claims for damages sustained by the class members, other than purely emotional damages unaccompanied by physical injury.

De-certification should also be made on policy grounds. The danger of magnified and opportunistic claims of potential class members who have no injuries also weigh in favor of de-certification. All of the purported class members testified that they are willing to pursue their claims on an individual basis, even if this case is not certified. Those claims are better resolved or settled under Louisiana's liberal Joinder Rules concerning consolidation or accumulation of actions. Those procedural devices better serve the policies underlying the substantive law and insure fairness to all parties, so that defendants are not subjected to unfair settlements, all or nothing verdicts, or skewed trial outcomes involving meritless claims.

ARGUMENT

(1) The discretionary policymaking decisions implicating budgetary priorities of a Town to provide services to its citizens is protected by Discretionary Act Immunity.

This Honorable Court has held that local legislative officials are entitled to absolute immunity from suit for their actions taken when performing legislative functions.[13] This Honorable Court specifically stated that the enactment of an ordinance, which reflected the discretionary, policymaking decisions implicating the budgetary priorities of the city and the services it provides to its constituents, protected the local legislators from tort suit with immunity.[14] This Honorable Court further held that the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability.[15] The time and energy required to defend against a lawsuit are of particular concern at the local level, where part time citizen-legislators remain commonplace, and the threat of liability may significantly deter service in local government.[16] The principle of absolute immunity for legislators is not new, but has its roots in the English Parliament's struggles of the 16th and 17th Centuries.[17] Thus, in the ***Bogan*** case local elected officials' actions of eliminating from their budget the department where an employee who had been reported as cursing members of the general public were found to be protected by immunity from a civil rights suit brought by the employee.

This Honorable Court held that government discretion does not end upon the initiation of programs and activities, but includes determinations made by executives and administrators in establishing plans, specifications or schedules of operations.[18] This Honorable Court further held that the acts of subordinates in carrying out the operations of government in accordance with

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[13] ***Bogan v. Scott-Harris, 118 S.Ct.966, 523 U.S. 44 (1998)***

[14] ***Id at p. 49***

[15] ***Id at p. 50***

[16] ***Id at p. 50 citing Tenney v. Brandhove, 341 U.S. 36, 37 (1951)***

[17] See ***Tenney supra; & Bogan. at p. 48.***

[18] ***Dalehite v. United States, 346 U.S. 15, 35-36 (1953)***

official directions cannot be actionable.[19] In the ***Dalehite*** case, the United States government cabinet-level decision to institute a fertilizer export program to war ravaged Europe was never seriously disputed. However, the need for further testing of the explosive properties of the fertilizer, (considering the explosion that leveled Texas City, Texas, in 1947), was the subject of a negligence suit instituted by some 300 plaintiffs asserting personal and property damage claims under the Federal Tort Claims Act as a result of the explosion. This Honorable Court held that the four specific acts of negligence found actionable by the trial court in ***Dalehite*** did not subject the United States Government to liability because they were all responsibly made at a planning, rather than an operational, level.[20]

An analogy is easily made to the case at bar considering the choice of the Town of Ferriday in its purchase of the current water plant. Choices such as the type of plant to purchase, considering meager resources in the 1970's and early 1980's; the rising cost of construction which made the Town consider the adsorption clarifier system rather than conventional tube settlers or sedimentation pond; the placement of a water intake structure nearly one mile away from the plant when the Town could not afford to purchase the land immediately behind the plant; the placement of chemical feed equipment near the adsorption clarifier, rather than at the source of water intake; the rate of feed and choice of chemicals and "floccing" agents to remove the manganese from the water; the maintenance schedules for repair of the adsorption clarifier, the clean water holding tank, and backwashing the water filters all involve the exercise of discretion by the Town. The Town of Ferriday should be provided immunity protection from suit based on discretionary choices made due to monetary constraints imposed on the Town. Further, the Town could only afford to hire a certain number of water plant operators, and by the time that these operators obtained certification from the State, the operators would find better paying jobs. Clearly, discretionary acts performed by the Town of Ferriday in operating their water plant

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[19] ***Id at p. 36.***

[20] ***Id at p. 42.***

should protect them from tort suit herein.

This Honorable Court further extended immunity to employees of the Federal Aviation Administration when their aircraft design inspection procedures failed to detect a violation of applicable safety standards in the Boeing 707 trash receptacle, which resulted in a fire that killed most passengers aboard a flight from Rio de Janeiro to Paris.[21] Finding that the FAA had limited resources to conduct the inspections necessary to comply with the elaborate compliance review process, this Court stated that the parameters of discretionary immunity were impossible to define.[22] Certain factors must be considered when determining whether the actions of a government employee are protected from liability based on Discretionary Act Immunity, including 1) the nature of the conduct rather than the status of the actor, and 2) the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals.[23]

This Court reasoned that Congress wished to prevent judicial "second guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.[24] By fashioning an exception for discretionary governmental functions, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations."[25] The Town of Ferriday is entitled to the Discretionary Act Immunity of **La. R.S. 9:2798.1** because the providing of water to its citizens is a discretionary act, for their health, safety and general welfare, as testified to by former Ferriday Mayor Montgomery. Mayor Montgomery testified that the Town had the sole discretion to place its funds where necessary to run the Town and provide services to its citizens.

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[21] ***United States v. Varig Airlines, 467 U.S. 797 (1984)***

[22] ***Id at p. 813 citing Dalehite v. United States,346 U.S. 15, 33 (1953)***

[23] ***Id at p. 813.***

[24] ***Id at p. 814.***

[25] ***Id at p. 814*** **citing** ***United States v. Muniz, 374 U.S. 150, 163 (1963).***

Mayor Montgomery testified that the note payable on the water plant and chemical costs related to running the water plant were the single largest expenditures the Town made, and the Town had to apply for grants, raise water consumption bills, and raise taxes to keep the water plant running.[26]

Every witness who testified at the class certification hearing agreed that the Town considered the cost of the water plant in its initial construction, monthly chemical costs, maintenance, operation, and hiring of operators, to be a crucial factor in providing water to its residents.[27] In essence, the Town did what it could do with limited resources to provide its citizens with the best water available. Engineers, chemists, water operators, and chemical salesmen could not figure out how the Town water plant could remove the manganese. The Town of Ferriday, with 4,500 residents, simply could not afford the $200,000.00 annual chemical cost bill and the $240,000.00 annual note payable to the Farmers Home Administration for the water plant. The decision to allocate scarce Town resources to the water plant was purely discretionary, by definition, and the Town should therefore be entitled to Discretionary Act Immunity pursuant to **La. R.S. 9:2798.1.** The source of the Town's Exception of No Cause and/or No Right of Action was based on Discretionary Act Immunity.

This Honorable Court refused to "second guess" the political, social and economic judgments of an agency exercising its regulatory function in the ***Varig Airlines*** case, considering the FAA's goal of accommodating air transportation safety and the reality of finite agency resources.[28] Considering the Town of Ferriday's minimal resources, where the chemical costs and note payments for its water plant are the largest expenditures the Town makes in its entire budget, such decisions should be protected by Discretionary Act Immunity. Thus, the Trial Court erred denying the Town's Exception of No Cause/No Right of Action, and

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[26]**See Record p. 1489-1491, 1501-1502.**

[27]**See Record (p. 1457, 1489-1491, 1501-1502, 1565-1566, 1626-1627, 1646-1666, 1647, 1477, & 1833).**

[28]***U.S. v. Varig Airlines, 467 U.S. 797, 820 (1984)***

considering this Court's pronouncements in the ***Bogan***, ***Dalehite***, and ***Varig Airlines*** decisions, this writ application should be granted, and Mrs. Martello's suit should be dismissed.

(a) The Town of Ferriday's argument that it is entitled to Discretionary Act Immunity was never fully considered by any court in this matter.

The Trial Court only spent one paragraph in its 24 page "Reasons for Judgment" addressing the Town's Exception of No Right of Action, conformed by agreement of the parties at the beginning of the class certification hearing to an Exception of No Cause of Action, as follows:

> Since the Court finds that the plaintiff has met and satisfied all of the Article 591(A) Requirements for Certification, and has met and satisfied the Article 591(B)(3) Requirement for Certification as to all three defendants, the Court finds that the Town of Ferriday has failed to meet the burden of proof on its Exception of No Cause of Action. The Town of Ferriday's Exception of No Cause of Action, therefore, is hereby **OVERRULED** for all the same reasons for Judgment assigned herein. ***(See App. "B").***

This statement in the Trial Court's Written Reasons for Judgment that the plaintiff met all of the requirements for class certification, and that the Town had failed to meet their burden of supporting their Exception, is *per se* grounds to overturn the Trial Court's Judgment. The Louisiana First Circuit Court of Appeal's decision in ***Graf v. Town of St. Gabriel***, required that the Trial Court first consider the Exception of No Right of Action before considering and/or ruling on the class certification issue.[29]

In Louisiana, an Exception of No Cause of Action is the

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[29] ***Graf v. Town of St. Gabriel, 744 So.2d 1 (La.App. 1Cir. 1998)***

proper procedural vehicle to challenge the use of a class action procedure, and it "need not be heard on the pleadings alone".[30] The Louisiana Supreme Court has upheld the ability of parties to put on evidence in support of or in opposition to class certification through the procedural device of an Exception of No Cause of Action.[31] In the case at bar, no evidence presented by the plaintiff supported their theory that inconvenience and nuisance alone were compensable. In fact, Louisiana law does not allow a suit for nuisance alone to proceed, unless accompanied by severe emotional distress, individual to the claimant, and well documented with appropriate medical history.

In ***Ursin v. New Orleans Aviation Board***[32] the Trial Court granted an Exception of No Cause of Action refusing to certify a class action, but allowed the case to proceed through individual suits brought by property owners adjacent to the New Orleans International Airport. The suit involved complaints of excessive noise and inconvenience associated with the residents living near the airport in the aircraft flight path.

Additionally, a damage award to a property owner adjacent to the New Orleans Fairgrounds Racetrack was overturned by the Louisiana Fourth Circuit of Appeal when the only real damage a landowner had suffered was "mere inconvenience" without economic harm.[33] The Court held that damage to the "ambiance" of the building by the fairground lights was no more than "inconvenience" defined by **Louisiana Civil Code, Articles 667 & 668**, and not compensable. The owner of the property never attempted to market the property, had no intention of selling it, did not show it as a historical attraction, and steadily increased the rent to his tenants over the years that the damage allegedly occurred.

An award of $1,000.00 in damages was upheld by the

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[30] ***Feldheim v. Si-Sifh Corp., 715 So.2d 168 (La. App. 5 Cir. 1998) citing Stevens v. The Board of Trustees, 309 So.2d 144, 152 (La. 1975); Ursin v. New Orleans Aviation Board, 506 So.2d 947 (La. App. 5 Cir. 1987).***

[31] ***Stevens, Supra.***

[32] ***506 So.2d 947 (La.App. 5Cir. 1987).***

[33] ***Welcker v. Fairgrounds Corp., 577 So.2d 301 (La. App. 4Cir. 1991).***

Louisiana Third Circuit Court of Appeal based on noise and inconvenience suffered by the plaintiff during construction of a water pumping station adjacent to the plaintiff's home.[34] Although the Louisiana Third Circuit found the noise a nuisance, there was no evidence of depreciation of property values, no damage to vehicles from sandblasting, and the natural servitude of drain was not made more burdensome by the City's action.

All the putative plaintiffs who have testified in this case, including Mrs. Martello, are attempting to make claims for damages based on nuisance, inconvenience, and minor business expense associated with the boil order, such inconvenience is usually not enough to award damages against the alleged offending party.[35] In ***Barrett***, a plaintiff's claims for mental anguish, respiratory disease, inconvenience, and diminution of property value due to a nearby plant construction were rejected.

The Third Circuit Court of Appeal upheld the jury verdict which rejected plaintiff's claims that alleged noxious fumes from a nearby hazardous waste site caused his damages.[36] In the ***Bartlett*** case, one of the plaintiffs testified that smells from the adjacent hazardous waste facility disturbed his sleep, burned his eyes, and occasionally made him dizzy. The large trucks passing in front of his house would track mud and clay on his road, and on one particular occasion the smell was so bad that it "knocked him to his knees". Despite this compelling testimony, and much like Mrs. Martello and the purported class representatives in this case, the plaintiff never sought medical treatment for alleged medical problems associated with the smells. No complaints of residual effects after the odor problem disappeared were made by the residents, and the Jury found no damages.

The Third Circuit Court of Appeal has held that the

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[34] ***Stewart v. City of Pineville, 511 So.2d 26 (La. App. 3Cir. 1987).***

[35] ***Barrett v. T.L. James & Co., 671 So.2d 1186 (La. App. 2Cir. 1996) Writ denied 674 So.2d 973 (La. 1996).***

[36] ***Bartlett v. Browning-Ferris Industries, Chemical Services, Inc., 683 So.2d 1319 (La. App. 3Cir. 1996) overruled on other grounds 759 So.2d 755 (La. 11/12/99).***

defendant/owners of excavation pits were not liable to the plaintiffs for mental anguish suffered strictly as a result of property damage.[37] The Court upheld the property damage award related to excessive noise, fumes, and dirt caused by the defendant's business, but rejected plaintiff's claims for damages related to mental anguish suffered in conjunction with the property damage.

The Claims asserted in this case are solely for mental anguish, nuisance, and inconvenience. These types of claims have consistently been rejected when they were made without any associated physical damages.

The Town of Ferriday's Exception of No Cause/No Right of Action cuts right to the heart of this case in the sense that plaintiffs' claims for nuisance alone are not supportable when they are not accompanied by physical damage to either their persons or their property. The Town did not place a Boil Order on its citizens, that restriction was imposed by the Department of Health and Hospitals[38].

The issue of turbidity or water clarity was the only reason that DHH issued the Boil Notice. There was never an issue of Ferriday water being toxic or non-consumable. The Exception of No Cause/No Right of Action should have been granted by the Trial Court, the suit against the Town should have been dismissed.

Alternatively, the Town's providing water to its citizens is a discretionary function, and therefore the Town is protected by Discretionary Act Immunity. By alleging strict liability Mrs. Martello has placed the issue of Discretionary Act Immunity at the forefront of her suit. Discretionary Act Immunity is governed by **La. R.S. 9:2798.1** as follows:

> F. "Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policy

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[37] ***Begnaud v. Camel Contractors, Inc., 721 So.2d 550 (La. App. 3Cir. 1998).***

[38] No claim has been asserted by the putative plaintiffs against the Louisiana Department of Health and Hospitals.

making or discretionary acts when such acts are within the course and scope of their lawful powers and duties."

The Town has no statutory or jurisprudential duty to provide its citizens with drinking water. The fact that such a decision was made indicates its discretionary nature. Providing of fluoride to a municipal water supply, has been found a "discretionary act", and related to the "health, safety, convenience, and general welfare" of its citizens.[39] Further, a DHH decision not to warn the general public of bacteria dangers related to the ingestion of raw oysters was deemed discretionary, and subject to immunity.[40] A Dock Board's decision to restrict fishing in certain areas of Lake Pontchartrain was deemed discretionary.[41] Finally, the Louisiana Second Circuit Court of Appeal held that a municipality's decision to apply the proceeds of an electricity rebate to capital improvements of the electrical plant rather than distribute the proceeds to utility customers was soundly within the City's discretion and legislative authority.[42]

A governmental entity's choice to provide water to its citizens should protect it from suit. The Courts should not restrict legislative discretion in policy formation or its implementation by imposing tort liability for discretionary decisions.[43] When discretion is involved, the Court must determine whether that discretion is the kind which is shielded by the Exception; i.e., one that is grounded in social, economic, or political policy.[44] The providing of drinking water by the Town of Ferriday is governed by **Louisiana Revised Statutes, 33:3811 through 33:3837.** Public

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[39] ***Attaya v. Town of Gonzales, 192 So.2d 188 (La. App. 1Cir. 1966).***

[40] ***Simeon v. Doe, 618 So.2d 848 (La. 1993).***

[41] ***Boguille v. Chambers , 685 So.2d 582 (La. App. 4 Cir. 12/11/96).***

[42] ***Michael v. City of Minden, 704 So.2d 409 (La. App. 2 Cir. 1997).***

[43] ***Hardy v. Bowie, 744 So.2d 606, 613 (La. 1999).***

[44] ***Hardy v. Bowie, Supra citing Berkovitz v. U.S., 486, U.S. 531, 108 S.Ct. 1954, 100 l. Ed. 2d 531 (1988).***

utilities are governed by **La. R.S. 33:4161 *et. seq***. The Town is entitled to the protection of Discretionary Act Immunity contained in **La. R.S. 9:2798.1** because providing water to its citizens is a discretionary act related to the social, economic and political policies of health, safety and general welfare. Mayor Montgomery testified that the Town had the sole discretion to place its funds where necessary to run the Town and provide services to its citizens, including providing water to its citizens. For these reasons, it is respectfully requested that this Honorable Court grant the Town's writ application, and reverse the lower courts' decisions denying the Town's exceptions.

(2) This case is not suitable as a class action because it does not advance or preserve the intertwined goals of effectuating substantive law, judicial efficiency, and avoiding undesirable and unfair results to the parties.

The Louisiana Supreme Court has held that, under certain circumstances, the existence of individual causation and liability issues as to each potential class member may so predominate over common issues that class certification is inappropriate.[45] The case at bar is such a case when due process rights of potential class members are implicated by the lone plaintiff and class representatives' unique damage issues. Class certification in Louisiana is recognized in the ***Duhe v. Texaco, Inc.***[46] decision as being virtually identical to the requirements of **Federal Rule 23.**[47] This Honorable Court's decisions to decertify class actions considering the **Rules Enabling Act's** admonition that rules of procedure shall not abridge, enlarge or modify any substantive

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[44] ***Bernard v. Thigpen Construction Company, et al, 97-1877 (La. 11/21/97) 702 So.2d 1387.***

[46] ***Duhe v. Texaco, Inc. 99-2002 (La.App. 3 Cir. 2/7/01), 779 So.2d 1070.***

[47] ***Acts 1997, No. 839, §1, eff. July 1, 1997.***

right, should be considered in this case.[48]

The primary issue considering **Article 591** in this case is whether common questions of law or fact predominate over individual issues and whether the class action is superior to other procedural methods available. This requirement significantly limits class actions, considering the additional **Louisiana Code of Civil Procedure's** restriction that certification not depend on individual proof unique to individual class members.[49] In this case, class representatives report business losses, but the vast majority of the claims concern minor misery, nuisance and aggravation, without further showing of damages. Class actions do not serve to effectuate substantive law or the policies underlying causes of action when, by use of the procedure, claims are given substance that, when pursued individually, have none under the law. This is the distortion effect recognized in ***McCastle***, ***Ford***, and ***Hampton***.[50] Despite their recitation of certification requirements, none of the lower courts made any serious inquiry into the substantive law applicable to the purported class of aggrieved persons, or the effect of the Town's affirmative defense of Discretionary Act Immunity, the individual issue predominance and availability of alternative joinder methods.

One undesirable end specifically identified by the Louisiana Supreme Court in ***Ford v. Murphy Oil USA, Inc.,***[51] where a class of 4,009 persons claiming minor physical injuries caused by the emissions from four petrochemical plants was

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[48] ***Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999) citing Amchem Products v. Windsor, 521 U.S. at p. 613 (1997).***

[49] ***Article 591C.***

[50] This analysis to determine whether the class action effectuates the policies underlying substantive law does not conflict with the admonition that district courts not be concerned with whether plaintiffs will prevail in the merits or even if they have asserted a cause of action. See, e.g., ***Hampton, 730 So.2d at6 1093; Doerr v. Mobil Oil Corporation, 01-0775 (La.App. 4Cir. 2/27/02), 2002 WL 334679 (not yet released for publication), both citing Miller v. Mackey International, Inc., 452 F.2d 424, 427 (5th Cir. 1971).***

[51] ***96-2913 (La. 9/9/97), 703 So.2d 542.***

decertified because individual issues of causation predominated over common issues of the defendants' alleged fault as follows:

> In the context of mass tort class actions, certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely the defendant will be found liable and results in significantly higher damage awards.
>
> In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.[52]

That danger is echoed in Judge Kuhn's concurring opinion in ***Hampton***, cited and discussed above. The Louisiana courts' collective conclusions affirming certification resulted from insufficient analysis and an insufficient exercise of discretion.

CONCLUSION

The plaintiff, and putative class representatives, are straining to characterize this case of "glorified misery," and turn it into a "mass disaster tort suit" like the ***McCastle v. Rollins Environmental Services of Louisiana, Inc.***[53] case. In the ***Rollins*** case, 4,000 residents sustained minor and temporary physical injuries allegedly caused by the actions of a single defendant who polluted the air that purported class members all breathed. Except for the identification of the Town's water plant as the sole source of water in Ferriday, there are no other similarities between the case at bar and the ***McCastle v. Rollins*** case. Class

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[52] *Id.*, quoting ***Castano v. American Tobacco Co.***, ***84 F.3d 734, 746 (5Cir. 1996)(citations omitted)***. The last sentence of the quoted paragraph reads: "These settlements have been referred to as judicial blackmail."

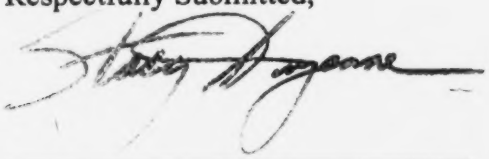
[53] ***456 So.2d 612 (La. 1984).***

members in ***McCastle*** **actually breathed polluted air** and **sustained actual physical injury**, however minor or temporary. In the case at bar, there has been no evidence whatsoever that the Town's water was polluted, that any of the residents drank it during the Boil Notice, or were injured even if they had. To the contrary, Town employees testified that they brushed their teeth in the water and bathed in it during the Boil Notice, without suffering any harm.

This case involves the assertion of what amounts essentially to individual claims of frustration, annoyance, and inconvenience, resulting from years of alleged uncontrollable levels of Manganese, over which the Town, Owen & White, and US Filter had no control. Manganese, while unpleasant, is not a health hazard, and is not something that the Town could control in Marengo Bend, the source of its water. The five class representatives may be expressing frustration at the fact that the Boil Order was the "final straw". Irritation over having to boil drinking water does not justify a class action lawsuit. However creative the attorneys can be in characterizing this case as a mass tort case, this Honorable Court should look at Louisiana and federal jurisprudence to determine whether there is any merit to what amounts to a glorified nuisance claim. If the class certification is allowed to stand, then the floodgate of class action suits will open, allowing persons with no damages to extort settlements from small municipalities across Louisiana and this Country. Most small municipalities will not be able to afford to provide basic services to their residents. Who then will benefit from class action suits? The people purportedly whose rights are being trampled will experience firsthand hardship as a result of class action lawsuits.

For the foregoing reasons, the Town of Ferriday Prays that this writ application be granted for full briefing and argument, or alternatively, that a peremptory writ be issued reversing the decisions of the Louisiana courts, de-certifying this class, and remanding the case for further proceedings as an ordinary action.

Respectfully Submitted,



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